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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

RICHARD REYNALDO GARCIA,

Petitioner,

vs. No.

STATE OF NEW MEXICO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO

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QUESTIONS FOR REVIEW

Are New Mexico's Uniform Jury Instructions for capital sentencing proceedings unconstitutional in that:

1) the instructions provide insufficient guidance about the relationship between aggravating and mitigating circumstances and the burden of proof thereon; and

2) the instructions, by permitting unrestricted consideration of "the defendant and the crime," do not sufficiently channel discretion according to clear and objective standards?

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Richard Reynaldo Garcia respectfully petitions this Court to review a judgment of the Supreme Court of New Mexico. The judgment affirmed his two convictions of murder and his sentences of life imprisonment and of death.

CITATION TO OPINION

The opinion of the court below is unofficially reported at 22 State Bar of New Mexico Bulletin 139. A copy of the unofficial opinion is included in the appendix. The opinion is not yet officially reported in New Mexico Reports [N.M.] or in Pacific Reporter [P.2d].

JURISDICTION

The judgment sought to be reviewed was filed January 20, 1983. Rehearing was not requested. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

STATUTORY PROVISIONS AND UNIFORM JURY INSTRUCTIONS

The death penalty was imposed pursuant to New Mexico's Capital Felony Sentencing Act, Section 31-20A-1 through Section 31-20A-6, N.M.S.A. 1978 (1981 Repl.Pam.) (effective July 1, 1979). It is the first sentence of death under the statute to be affirmed by the New Mexico Supreme Court. The statute is set out verbatim in the appendix to this petition.

The case also involves certain Uniform Jury Instructions. Uniform Jury Instructions have been adopted by the Supreme Court of New Mexico for all criminal cases. [They are hereinafter cited as "N.M.U.J.I. Crim."] Their General Use Note states in pertinent part:

> Except for grand jury proceedings, when a uniform instruction is provided for the elements of a crime, a defense or a general explanatory instruction on evidence or trial procedure, the uniform instruction must be used without substantive modification or substitution. In no event may an elements instruction be altered or an instruction given on a subject which a use note directs that no instruction be given. For any other matter, if the court determines that a uniform instruction must be altered, the reasons for the alteration must be stated in the record.
>
> General Use Note, N.M.U.J.I. Crim., N.M.S.A. 1978 (1982 Repl.Pam.).

The Capital Felony Sentencing Act has been implemented by mandatory Uniform Instructions. See N.M.U.J.I. Crim. 39.10 through 39.43. The pertinent instructions are included in the appendix and are the ones in effect at the time of petitioner's trial. (These instructions were subsequently amended.) Copies of the actual instructions given at petitioner's sentencing proceeding are also included in the appendix.

STATEMENT OF THE CASE

I. GUILT STAGE

The petitioner was indicted on two counts of murder. At the time of the killings, he was an inmate at the Penitentiary of New Mexico. The victims were another inmate and a correctional officer. A third inmate, Jesse Trujillo, was charged for the same murders and for assault on another correctional officer. Both defendants were charged with capital murder. The aggravating circumstance charged was intentional murder of a correctional employee by an inmate. See Section 31-20A-5E, N.M.S.A. 1978 (1981 Repl.Pam.).

Petitioner Garcia was tried before a jury and convicted as charged on both counts. (The trial evidence is summarized in the opinion

below.) In accordance with New Mexico procedure, sentencing proceedings were thereafter conducted before the same jury.[1]

II. SENTENCING STAGE

No additional evidence was presented at the sentencing stage. The trial judge gave the uniform opening instruction and both counsel made argument. The jury was then given the remaining instructions.

The jury was instructed on the elements of the aggravating circumstance. They were instructed that they must first determine whether each element of the aggravating circumstance existed beyond a reasonable doubt. If they so found unanimously, they were then to consider whether any mitigating circumstances existed and to determine the penalty. The jury was instructed as to four specific mitigating circumstances. They were also told that they could consider in mitigation "any other circumstances relating to this case and/or to the defendant."[2] The jury was further instructed as follows:

> The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged and that the mitigating circumstances do not outweigh the aggravating circumstance.
>
> N.M.U.J.I. Crim. 39.31 (written instruction on burden of proof) (emphasis added); R. at 180.
>
> * * *
>
> If you have unanimously agreed on a finding that the aggravating circumstance charged was present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant

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1. Jesse Trujillo was tried before a different jury and convicted of both murders and of assault. At the sentencing proceedings, however, that jury did not impose a sentence of death. Sentences of life imprisonment were therefore imposed by the trial court. Trujillo's convictions were affirmed on appeal. State v. Trujillo, ___ N.M. ___, 657 P.2d 107 (1982).

2. This particular instruction was a modification of the applicable Uniform Jury Instruction. It was given at defense request, over objection by the State. The uniform instruction does not contain the language quoted above or its equivalent. See R. at 172; compare with N.M.U.J.I. Crim. 39.30. An instructions conference was held prior to the sentencing proceeding. See T. 248 at 605-715.

was found guilty of murder. You must then consider whether there are any mitigating circumstances.

If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against the aggravating circumstance you have found in this case. After weighing the aggravating circumstance and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.

If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court. * * *.

N.M.U.J.I. Crim. 39.33 (concluding written instruction) (emphasis added); R. at 187.

Pursuant to the uniform instructions, the jury made two written findings. They unanimously found beyond a reasonable doubt that the aggravating circumstance existed as charged. They unanimously agreed that petitioner should be sentenced to death. R. at 188. Sentence was imposed accordingly and petitioner appealed to the New Mexico Supreme Court.

III. APPEAL

The petitioner on appeal challenged the constitutionality of two Uniform Jury Instructions. Defense counsel did not object to the instructions at trial.[3] This issue was therefore raised on appeal for the first time. It was raised under New Mexico's doctrine of fundamental error (Rule of Criminal Appellate Procedure 308(b), N.M.S.A. 1978) and pursuant to Section 31-20A-4B of the Capital Felony Sentencing Act, N.M.S.A. 1978 (1981 Repl.Pam.).

The Supreme Court discussed and rejected on the merits petitioner's arguments. The court concluded: "We find no fault with these jury instructions." The court went on to hold that objections to jury instructions could not be first raised on appeal. Senior Justice Sosa dissented on both points. The two challenged instructions, followed by a summary of petitioner's arguments, are set forth below.

3. Petitioner was declared an indigent and trial counsel represented him under contract with the New Mexico Public Defender Department. There was apparently a conflict of interest at the trial level. On appeal, the Appellate Division of the Public Defender Department was appointed to represent petitioner by the Supreme Court of New Mexico.

> The law provides that you cannot sentence the defendant to death unless you are satisfied beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged. The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under the aggravating circumstance charged and that the mitigating circumstances do not outweigh the aggravating circumstance.
>
> N.M.U.J.I. Crim. 39.31, supra (emphasis added).
>
> * * *
>
> If you have unanimously agreed on a finding that the aggravating circumstance charged was present, you must then consider the penalty to be imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during this sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder. You must then consider whether there are any mitigating circumstances.
>
> If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against the aggravating circumstance you have found in this case. After weighing the aggravating circumstance and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment.
>
> N.M.U.J.I. Crim. 39.33, supra (emphasis added).

Petitioner contended that these instructions are inadequate under the Eighth and Fourteenth Amendments of the federal Constitution. The first instruction requires the State to prove beyond a reasonable doubt that the aggravating circumstance exists and "that the mitigating circumstances do not outweigh the aggravating circumstance." The latter burden of proof involves a negative proposition and is in this respect confusing. Moreover, it does not provide the jury with "detailed and specific guidance." See Godfrey v. Georgia, 446 U.S. 420 at 428 (1980). It leaves open the possibility that aggravation and mitigation will be found to exist in equal balance. It gives no guidance to the jury in such a situation: has the State met its burden of proof or not?

The concluding uniform instruction tells the jury to weigh the aggravating and mitigating circumstances -- with no standard of proof or further guidance -- and to then consider "both the defendant and the crime." The language of the instruction was adopted verbatim from the

Capital Felony Sentencing Act. See Section 31-20A-2B, N.M.S.A. 1978 (1981 Repl.Pam.). This instruction does not sufficiently "channel the [jury's] discretion by clear and objective standards." Godfrey v. Georgia, supra. "The defendant and the crime" is a standard of broadness and subjectivity. Without some limitation on its use, it injects a degree of unfettered discretion into the final sentencing determination. It allows virtually any factor whatever to serve as a basis for the death penalty.[4] Under New Mexico's uniform instructions, a jury can find that the charged aggravating circumstance exists, that it is balanced with the various mitigating factors but that the defendant is slovenly or arrogant or Hispanic and should therefore die.

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The Supreme Court of New Mexico has affirmed the first sentence of death under the 1979 statute. In doing so, the court has decided questions involving federal constitutional law. These questions have never been settled by this Court. The questions are:

1. Whether the jury instructions provide sufficient guidance about the relationship between aggravating and mitigating circumstances and the burden of proof thereon? Cf. Harris v. Pulley, 692 F.2d 1189, 1194-1195 (9th Cir. 1982) and Ford v. Strickland, _____ F.2d _____ (11th Cir. January 7, 1983) and compare with State v. Wood, 648 P.2d 71, 83 (Utah 1982); see also Smith v. North Carolina, 51 U.S.L.W. 3418 (November 30, 1982) (Stevens, J.).

2. Whether the instructions sufficiently channel discretion by permitting unrestricted consideration of "the defendant and the crime"?

The questions at bar involve interpretation of this Court's decisions holding that:

> [The State in a capital proceeding] must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make

4. Trial counsel requested an instruction stating that, apart from the charged aggravating circumstance, the jury could not "take into account any other considerations as aggravating circumstances." The instruction was not a Uniform Jury Instruction. The State objected and it was refused by the trial court. See R. at 161; T. 24B at 605-715.

rationally reviewable the process for imposing a sentence of death.'

Godfrey v. Georgia, 446 U.S. 420 at 428 (1980) (footnotes and citations omitted).

* * *

*** [T]he Eighth and Fourteenth Amendments require that the sentencer *** not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586 at 604 (1978) (emphasis in original); accord, Eddings v. Oklahoma, 455 U.S. 104 (1982).

These latter two decisions were cited and relied upon by the court below in its opinion. Cf. also Henry v. Wainwright, 661 F.2d 56 at 58-60 (5th Cir. 1981) (consideration of nonstatutory aggravating factors impermissible), vacated and remanded on other grounds ___ U.S. ___ (1982); accord, Proffitt v. Wainwright, 685 F.2d 1227 at 1266-1269 (11th Cir. 1982); contra, Harris v. Pulley, 692 F.2d 1189 at 1194 (9th Cir. 1982).

CONCLUSION

For the foregoing reasons, Richard Reynaldo Garcia respectfully petitions this Court to issue its writ of certiorari and review the judgment below.

Respectfully submitted,

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